

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2144

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KENDALL BROWN,

Petitioner-Appellant,

-against-

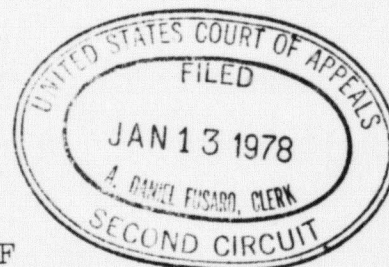
JOHN WILMOT, Superintendent of
Elmira Correction Center, and
LOUIS J. LEFKOWITZ, Attorney
General of the State of New York,

Respondents-Appellees.

BPS
Docket No. 77-2144

JOINT APPENDIX

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



RICHARD J. KLEIN
Attorney for Appellant
KENDALL BROWN
909 Sheridan Avenue
Bronx, New York 10451
(212) 992-8134

LOUIS J. LEFKOWITZ
Attorney General
State of New York
Attorney for Appellees
Two World Trade Center
New York, New York 10047
(212) 488-7382

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PLAINTIFFS

BROWN, KENDALL

Petitioner

DEFENDANTS WERKER, J.

WILMOT, JOHN - Superintendent of
Elmira Correction & Reception Cent
and

LEFKOWITZ, HON. LOUIS J., Attorney
General of the State of NY.

CAUSE

28:2254 - Application for a Writ of Habeas Corpus.

ATTORNEYS

Richard J. Klein
909 Sheridan Ave.
Bronx, NY 10451
992-8134

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PROCEEDINGS

WERKER, J.

2 Orig

DATE	NR.	
8-31-77	1.	Filed Application for W/H/O under 28:2254.
8-31-77	2.	Filed petitioner's memorandum of law in support of petition for W/H/O. ^(application)
09-12-77	3	Filed affdvt. of service by Richard J. Klein that on 9-8-77 he served a copy of the Petition for a writ of Habeas Corpus and memorandum of law upon Respondent and the additional respondent
09-29-77	4-	Filed Respondents affdvt. in opposition to petitioner's application for a writ of habeas corpus.
09-29-77	5-	Filed Respondents memorandum of law
10-14-77	6.	Filed Memorandum & Order. Petitioner seeks a writ of habeas corpus alleging the denial of his application for bail pending appeal without stated reasons violates his rights to due process of law guaranteed under the Eighth & fourteenth Amendments of the U.S. Constitution. For the reasons stated, the petition for a writ of habeas corpus is denied. So Ordered, WERKER, J. n/m
11-9-77	7.	Filed Petitioner's Notice of Appeal to the USCA from the Order denying Petitioner's writ of Habeas Corpus dtd 10-13-77. Copies sent to: John Wilmot, Respondent Sup't. of Elmira Correction Center Box 500, Elmira New York 10492 Louis J. Lefkowitz Attorney General State of N.Y. 2 World Trade Center New York, N.Y. 10047
11-10-77	8.	Filed Petitioner's affdvt requesting a Certificate of Probable Cause
11-10-77	9.	Filed Petitioner's memo in support of application for a Certificate of Probable Cause.
11-14-77	10.	Filed Order that petitioner is granted a certificate of probable cause.....WERKER, J. n/m
11-21-77	11.	Filed Ex-Parte Order & affdvt that the docket sheet for this action be amended to include exhibits, which are copies of papers filed in the Appellate Div. of the Supreme Court of the State of New York, First Judicial Dep't. as listed.....WERKER, J.
11-30-77	12.	Notice of motion pursuant to New York C.P.L. §460.50 (bail pending appeal) with affirmation, order & exhibits.
11-30-77	13.	Memorandum of law with exhibits in support of Kendall Brown's application for bail pending appeal.
11-30-77	14.	Affirmation with exhibits in opposition, submitted by the Ass't Dist. Attorney.
11-30-77	15.	Reply memorandum of law with exhibit in support of Kendall Brown's application for bail pending appeal
11-30-77	16.	Filed Order of Associate Justice Harold Birns of the Appellate Div. of the Supreme Court of the State of New York, First Judicial Dep't. dtd 7-21-77, denying the application for bail pending appeal. So Ordered 7-21-77.... HAROLD BIRNS.

A 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----x
THE PEOPLE OF THE STATE OF NEW YORK

NOTICE OF APPEAL

-against-

Indictment No. 38/75

KENDALL BROWN,

Defendant.
-----x

S I R S :

PLEASE TAKE NOTICE that the above-named defendant hereby appeals to the Appellate Division of the Supreme Court of the State of New York, for the First Judicial Department, from a judgment of conviction rendered against him on June 13, 1977 in the Supreme Court, Bronx County, and from each and every part of such judgment.

The defendant was found guilty by a Jury's verdict of Robbery in the First Degree on May 3, 1977. On June 13, 1977 in Part 204, the defendant was sentenced on that verdict to an indeterminate sentence of imprisonment not to exceed seven (7) years with no minimum fixed (0-7), by the Hon. Harold J. Silbermann.

Dated: Bronx, New York
June 14, 1977

YOURS, etc.

RICHARD J. KLEIN
Attorney for Defendant
909 Sheridan Avenue
Bronx, New York 10451
212 - 992-8134

TO:
MARIO MEROLA
District Attorney
County of Bronx

CLERK OF THE SUPREME COURT
County of Bronx

RECEIVED
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DEPT. OF CORRECTIONS
BRONX COUNTY

JUN 14 PM 4:08

SUPREME COURT
BRONX COUNTY

A 3

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

-----x
THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

KENDALL BROWN,

Defendant-Appellant.
-----x

AFFIRMATION

Bronx Indictment #
38/1975

STATE OF NEW YORK)
 : ss.:
COUNTY OF BRONX)

RICHARD J. KLEIN, an attorney duly admitted to practice in the Courts of the State of New York makes this affirmation pursuant to Rule 2106 of the C.P.L.R., under penalties of perjury that the following upon information and belief are true.

I am presently the attorney of record for the defendant herein, and make the following application to this Court pursuant to §460.50-2(a)(1) of the Criminal Procedure Law to stay or suspend the execution of the defendant's 0-7 sentence of imprisonment and set bail in the area of \$5,000 bond or cash pending the determination of the defendant's appeal to this Court.

PRELIMINARY FACTS

On December 24, 1974, Kendall Brown (17) and two co-defendants were arrested and charged with Robbery in the First Degree.

Kendall was not charged with using a knife during the robbery but acting in concert with others who possessed knives. Thirty months later the case was tried before the Honorable Harold Silbermann and a jury. On May 3, 1977, after deliberating over twenty-six hours, the jury returned a verdict of guilty of Robbery in the First Degree against all three defendants. Kendall Brown who had been on \$750 bail for thirty months awaiting trial was remanded. One June 13, 1977, at the age of twenty, he was sentenced by Justice Silbermann to an indeterminate sentence of imprisonment not to exceed seven years with no minimum fixed (0-7).

On June 14, 1977 a written Notice of Appeal was filed with the Office of the District Attorney and filed in duplicate with the Clerk of the Supreme Court of the County of Bronx. A copy of the Notice of Appeal is annexed hereto following this affirmation.

Subsequent to the verdict of the jury and before sentence was imposed, Kendall Brown discharged his trial attorney, the office of Wm. Gallagher by Norman Buntaine and retained present counsel for sentence and an application for bail pending appeal. There has been no prior application made to any court for the relief requested in this application on behalf of Kendall Brown.

FAMILY BACKGROUND

Kendall Brown was born on December 27, 1956 the oldest son of Fred and Miriam Brown. Mr. and Mrs. Brown have

lived together continuously while raising, educating, and providing for their six children. The Browns have lived at the same address, 1682 Seward Avenue, Bronx, New York, 10473 Apt. 6D for the last 15 years.

Kendall's father, Fred Brown is a tractor-trailer operator and mechanic. Mrs. Miriam Brown, in addition to her maternal responsibilities, has held a position with the Board of Education for approximately the past eight years.

The only member of the immediate family who does not live at home is the oldest, Kenya. She is a twenty-two year old senior at Lehman College who has her own apartment. All the remaining children live at home with their parents of whom Kendall is the oldest. They are in order of age:

- (3) Glenn (18) is a full time matriculated student at Lehman College.
- (4) Kevin (17) is a Senior at Stevenson High School.
- (5) Fred Jr. (16) is a 10th grade student at Aviation High School.
- (6) Vardis (15) is in the 9th grade at Stevenson High School.

At the time Kendall was arrested, he lived at home with his folks and has continued to live with his family until his remand.

EDUCATION

Kendall completed his elementary school education at

the Holy Cross School. As part of their curriculum his general education was supplemented with religious observance and training.

He went to high school at Adlai Stevenson and was graduated with a diploma in January of 1975 approximately one month following his arrest in connection with these charges. During his senior year, he was the only male of nearly sixty students selected to participate in the Executive Internship Program. He was placed as an intern at the Roosevelt Island Development Corporation, where he worked on a daily basis with Jerry Maltz, an engineer who was a director of the project.

Upon graduation Kendall was unsure whether college suited his interests at the time. However, a year later in January of 1976 he entered Lehman College as a non-matriculated evening student for one semester which he did not complete. His mind was not at the time fully directed toward intellectual pursuits but rather to practical mechanical skills. An interest that he had learned and shared with his father. When an opportunity arose to receive "On the Job Training" in mechanics through the C.E.T.A. program at the Pioneer Marine School, he took and passed multiple examinations to qualify. He was accepted. He attended from May through December 1976 until he graduated (See attached exhibit).

EMPLOYMENT RECORD

Gypsy Cab Driver

Self-Employed

December 1976 - April 1977*

*TERMINATED by Gunpoint Robbery of the Taxi, although reported to the police neither the taxi or the perpetrators have been apprehended.

Pioneer Marine School

16 Fulton Street

New York, New York 10038

May 1976 - December 1976

Job Training - C.E.T.A. Program

Reference: Don Meisner

Bronx River Soundview Community Corporation
(Neighborhood Youth Corps)

1760 Westchester Avenue

Bronx, New York 10472

Crew Chief - July & August 1976

Counselor Winter program 1975-6

References: Joseph Mercado
Richard Stafford

Gulf Station

Bruckner Blvd. & Soundview Avenue

Bronx, New York

December 1974 - December 1975 (weekends)

Reference: Robert Fasinella

Roosevelt Island Development Corp.

Intern

September 1974 - January 1974

Reference: Jerry Maltz, Engineer

"Jack in the Box"

Story Avenue & White Plains Road

September 1974 - December 1974

Part-time

Neighborhood Youth Corps.

1680 Seward Avenue

Bronx, New York

July-August 1971, 2, 3, 4 and 5

References: Mr. Watson
Mr. Moskowitz
Mr. Shed

A.R.A. Food Services

50th St. & 11th Avenue

New York, New York

July-August 1971

Reference: F. Peterson

CONFLICTS WITH THE LAW

Examination of the probation report at the time of sentence confirmed the information received from Kendall and his parents that there were no Juvenile or Family Court conflicts with the law.

Prior to this charge, Kendall was arrested twice and received ACDs in each instance. The charges were possession of marijuana and possession of home-made karate sticks.

In May of 1975, when the charges in this indictment were still pending, Kendall was arrested at Bear Mountain, N.Y. on a charge of possession of marijuana. He received a \$25 fine,

although records are not clear whether there was a misdemeanor or violation plea. It is interesting to observe that the length of time from Kendall's last arrest is greater than the time span in which these conflicts arose.

COURT APPEARANCES

Kendall has an excellent record of making required court appearances. During the time on bail in this indictment, he made approximately 35-40 voluntary appearances.

COMMUNITY SUPPORT

There is a large segment of people in the community concerned about the future of Kendall Brown. At his sentence, although he was on the calendar a day prior to the codefendants' sentence day, all the seats in Part 204 were filled, in addition to people standing at the rear. People of all ages from his community came to demonstrate their feelings for him as well as their belief in him. I have attached some of the letters sent to the Court in his behalf following the Notice of Appeal at the rear of this affirmation.

REASONABLE PROSPECT OF SUCCESSFUL APPEAL

Since counsel was not present at the trial in any capacity, nor had access to a typewritten transcript of the trial at this time, accordingly, there are natural limitations on the ability to argue the facts and the merits. Nevertheless counsel

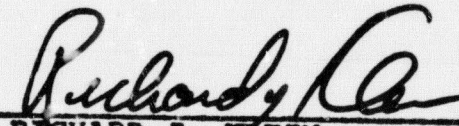
can say in full conscience that there is a reasonable prospect of success on appeal.

This was a close case. The jury deliberated over 26 hours before reaching their verdict. The major factual issue was identification. The People's case included the identification testimony of only one eye witness. There was testimony of innocence offered by the defendant.

I have attempted to outline simply at least two serious legal issues raised during the course of the trial in an accompanying memorandum. The arguments were developed from facts learned through conversations with the attorneys for the defendants, notes, and an excerpt of the Judge's charge. They are offered for the Court's consideration.

WHEREFORE, counsel respectfully requests that this Court stay or suspend the execution of the judgment of conviction, and set bail in the area of \$5,000 bond or cash pending the determination of Kendall Brown's appeal to this Court or that the Court fix bail in such an amount as to the Court seems just and proper under the circumstances.

Dated: Bronx, New York
25th day of June, 1977


RICHARD J. KLEIN

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

-----x
THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

KENDALL BROWN,

Defendant-Appellant.
-----x

Bronx Indictment #
38/1975

RECEIVED

JUN 27 1971

APPELLATE DIVISION SUPREME
COURT, FIRST DEPARTMENT

MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANT-APPELLANT'S
APPLICATION FOR BAIL PENDING
APPEAL

RICHARD J. KLEIN
Attorney for Defendant-
Appellant
909 Sheridan Avenue
Bronx, N.Y. 10451
212 - 992-8134

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PREFACE

I have not had access to a typewritten transcript of the trial. The following argument is based on conversations with Joseph Corozza, attorney for the codefendant, Darrel Smith, and Norman Buntaine, trial counsel for Kendall Brown. It is not intended that the Court should consider these as the only errors which will be argued later on appeal.

On the subject of bail pending appeal, the Criminal Procedure Law, §510.30-2(b), requires that the Court

"must also consider the likelihood of ultimate reversal of the judgment. A determination that the appeal is palpably without merit alone justifies, but does not require, a denial of the application regardless of any determination made with respect to the factors specified in paragraph (a)."

Accordingly I must argue the relative merit of an appeal without a typewritten transcript of a trial in which I did not participate or observe.

It is counsel's objective, however, to demonstrate that this appeal will present true questions of law in a close case with testimony of innocence.

At the close of the argument is an appendix indicating the source of information for facts concerning the trial.

7 14 3

FACTS

On December 24, 1974 at 1:30 P.M., Jerry Gonzales left a bank having withdrawn \$100. On his way down the street, he was knocked down from behind to the street by five young black men, threatening him with knives, demanding money. In a few minutes his \$100 was taken and the young men fled.

The complainant after regaining his feet came in contact with "passersby" in two gypsy cabs, and entered a vehicle in pursuit. After a few blocks the complainant seized a young man, codefendant Darrel Smith, who had a knife in his possession.

A second cab with "passersby" grabbed the defendant Kendall Brown with Jeffrey Sherrod, a distance from where Smith was seized. The complainant estimated the time from the start of the flight until the capture to be as long as ten minutes.

Shortly thereafter, police officers Murphy and O'Rourke arrived on the scene, and arrested the three young men. None of the complainant's money was recovered. The police recovered a knife from Smith. O'Rourke testified he received a knife, People's exhibit two, from the "passersby".

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THE TRIAL

People's Case

The People's case consisted of the testimony of Jerry Gonzales, and P. O. O'Rourke.* The People offered into evidence the knife which was taken from Smith, and a knife allegedly given to the police by the "passersby".

The sole evidence connecting the defendant Kendall Brown to this incident was the identification testimony of Jerry Gonzales.** There were no incriminating statements made by any of the young men.

Defendants' Case

All three defendants testified in their own behalf as to their innocence. The defendant Kendall Brown, (17) and Jeffrey Sherrod (18) testified they had never met Darrel Smith (22) before the arrest, and they were on their way to Sherrod's female friend's house when a group ran at

* P. O. Murphy did not testify because he had retired to Florida prior to the trial. The "passersby" did not appear at the trial nor did they testify in any proceeding. In fact they gave false information to the police about where they could be located.

** Gonzales testified that he had an opportunity to see the faces of his attackers while he was lying on his back on the street being threatened by knives, until they took his money and fled.

them and captured them.*

The defendant Smith testified to his innocence as well as the fact that he had never met Brown or Sherrod before the arrest. A character witness was called on Smith's behalf.

Rebuttal

There was no rebuttal evidence.

Deliberation and Verdict

The jury received the case at noon on May 2, 1977, and delivered its verdict some 26 hours later of guilty of Robbery in the First Degree as to each of the three defendants.

* Sherrod's friend Rosale Parrington testified that she had had a telephone conversation with him and was expecting his arrival.

ARGUMENT

POINT I

THE COURT'S CHARGE THAT "THE
INDICTMENT WAS THE BEST EVIDENCE
OF THE CHARGES AGAINST THE DE-
FENDANTS" WAS ERROR.

Prior to the jury's deliberation, the trial judge
charged the jury:

"Since the indictment itself is
the best evidence of the charges
against each defendant, I will first
read each count as written in the
indictment, and I will explain this
to you as we proceed."*

An exception was taken by codefendant Smith's counsel to this
part of the charge, which was joined in by Kendall Brown's
counsel.** The judge did not give a curative instruction. ***

Although the brief excerpt which is presently avail-
able indicates that the Court may have instructed the jury either
earlier in the charge or earlier in the trial that the indict-
ment was proof of nothing, this statement by the judge taken
at its best was misleading, confusing and unnecessary.

The law on this point is clear. Judge Dowsey
writes:

* See certified except of Judge's charge, Exhibit A.

** Ibid.

*** Ibid.

"It is accordingly required that the court charge the jury that the fact of the indictment constitutes no evidence of guilt, and this must be clearly and unmistakably presented. Even the mere implication in the language of the charge that the indictment could be considered as evidence has been deemed sufficient for reversal."*

Cases which demonstrate this principle fall into two categories. First, when the court although charging that the indictment is proof of nothing, undermines the effect of the charge by explaining the Grand Jury composition and the number of votes required to indict.** Second where the court confuses or limits the principle that the indictment is not evidence of guilt through the poor selection of language. In People v. McCutcheon, 14 A.D.2d 482 (4th Dept.), the court charged that the fact that the defendant had been indicted was no evidence "in and of itself that he is guilty of the crime" and the indictment "of itself is no evidence of guilt". The court in reversing held that the defendant was entitled to the flat charge that the indictment was no evidence of guilt.

The charge in the case at bar violates the rule of both situations. The statement that the indictment was evi-

* Dowsey, Charges to the Jury and Requests to Charge in a Criminal Case, Vol. I at p. 1-15 §11, Acme Law Book Co., 1968.

** This was criticized as error by the two judge dissent in People v. Fortt, 42 A.D.2d 859 (2nd Dept.), reversed by a unanimous court on the dissenting memorandum in 35 N.Y.2d 921 at 922.

dence was a poor choice of words which could only serve to undermine and confuse a fundamental legal principle. The court had an opportunity to attempt to cure its mistake but it did not.

POINT II

THE REFUSAL OF THE COURT TO ADMIT
INTO EVIDENCE A PORTION OF THE
GRAND JURY TESTIMONY OF AN ARREST-
ING OFFICER WHO WAS RETIRED AND
UNAVAILABLE WAS UNJUST.

During the trial, the People introduced into evidence over objection a knife, People's exhibit two, which officer O'Rourke testified he received from "passersby".* The defense later moved to introduce into evidence a portion of the Grand Jury testimony of O'Rourke's partner, Murphy. It was error for the Court to refuse to admit this testimony where:

1. Murphy's Grand Jury testimony was contradictory to the trial testimony of his partner O'Rourke on how the knife was recovered.**
2. Murphy was unavailable during the trial owing to his prior retirement from the force to Florida.
3. Defendant's trial counsel did not know prior to trial that Murphy testified before the Grand Jury or the substance of his testimony until he received the minutes sometime during the trial.
4. The District Attorney refused to consent to the admission of the testimony or stipulate in effect that Murphy would testify the same if he were called as a witness.
5. The court ruled that the testimony was irrelevant.

* This knife was admitted without the testimony of the finder. Complainant conceded on cross examination he could not specifically identify this knife as the one of the incident.

** Murphy testified before the Grand Jury on January 22, 1975, that the knife was recovered from the possession of the defendant (See Exhibit B).

6. The first two questions from the jury during their 26 hour deliberation made specific reference to testimony about the knives.*

Having overruled the defendant's objection to the admission of People's exhibit two in evidence, the court then further restricted the defenses' ability to impeach the weight of the testimony to be given the alleged finding of the knife.** There was no fault attributable to the defense for not producing this witness.

The court should have admitted the impeaching portion of the prior testimony of Murphy, despite its hearsay nature, in light of basic fairness and the Court of Appeals ruling in People v. Arnold, 34 N.Y. 2d 548,

"Were it necessary to determine whether the deceased utterance fit within an exception to the hearsay rule, it is observed that this court has in recent years emphasized that the hearsay doctrine has been too restrictively applied to keep reliable evidence from the jury. (See e.g., People v. Brown, 26 N.Y. 2d 88; Lefendre v. Hartford Acc. & Ind. Co., 21 N.Y. 2d 518). The issue is not determined now and may be reserved for resolution in a case which would require such a resolution." People v. Arnold, supra, at p. 549,550.

It would be difficult to imagine more in the way of indicia of reliability for the admissibility of hearsay evidence on behalf of the defendant's case, than to offer a sworn statement made during the People's presentation of evidence against the defendant to the Grand Jury, by a veteran police officer, a party adverse to the defend-

* See copies of questions, marked as Court Exhibits #2 and #3, Exhibit C and D.

** The defense was already restricted by not being able to hear or take the testimony of the finder.

ant*, in the presence of the prosecution.

Any objection raised by the People concerning a lack of opportunity to confront or examine the declarant is baseless. They were present at the time the statement was made with an unlimited right to question the declarant under oath in front of a stenographer and the Grand Jury.**

While the absence of the witness was not attributable to the defense, the People do bear some responsibility for the occurrence, although there is no suggestion of intent. The witness was a public servant with professional duties that included testifying in relation to his arrests. A police officer is normally considered to be in the control of the people. Whether this rule changes upon retirement is unimportant. The law must provide some accommodation to a defendant on trial for his liberty. The People would not agree to any compromise or stipulation. The Court ruled in the People's favor.

What happened here reached the level of injustice. The prosecution under the theory of protecting the right of cross-examination was able to prevail in keeping from the jury contradictory evidence on a crucial point, simply because a police officer had moved away.

* See dissent by Munder, J. in People v. Mitchell, 45 A.D. 2d 746 (2nd Dept.).

** The situation of the prosecution here is comparable to that of a defendant who finds perpetuated preliminary hearing minutes at trial.

The "Interests of Justice" are poorly served, if they are served at all, by any ruling of law that would allow the People's case to be aided or strengthened by the unavailability of a police officer, especially when this occurs through no fault of the defense, and the record indicates that such an advantage would accrue.

The testimony should have been offered to the jury for its determination of its worth.

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CONCLUSION

IN LIGHT OF THE FACT THAT THIS WAS A CLOSE CASE ON THE ISSUE OF GUILT, WHERE THE JURY IN A ONE WITNESS IDENTIFICATION DELIBERATED OVER 26 HOURS, THE LIMITED ARGUMENT OF COUNSEL, DEMONSTRATING BOTH AN UNCORRECTED ERROR IN THE JUDGE'S CHARGE ON A FUNDAMENTAL PRINCIPAL OF LAW AND A SERIOUS QUESTION OF THE PROPRIETY OF EXCLUDING CERTAIN EVIDENCE FROM THE JURY'S CONSIDERATION, INDICATES A REASONABLE POSSIBILITY OF REVERSAL ON APPEAL.

Respectfully Submitted,

Richard J. Klein

RICHARD J. KLEIN

Attorney for Defendant-Appellant

June 27, 1977

4 25 7

APPENDIX TO TRIAL INFORMATION

FACTS

Conversation with Joseph Carozza
Conversation and trial notes of Norman Buntaine
Indictment
Criminal Court Hearing
Criminal Court Complaint
Grand Jury Testimony of Jerry Gonzales

POINT I

Certified transcript of excerpt of Judge's charge

POINT II

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1. See Exhibit B
2. Conversations with Buntaine, Corozza
3. Conversations with Buntaine
4. Conversations with Buntaine, Corozza
5. Conversation with Buntaine
- * Conversations with Buntaine, Corozza

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6. See Exhibits C and D

INDICTMENT NUMBER 38/75

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF THE BRONX : TRIAL TERM PART 204

-----x

THE PEOPLE OF THE STATE OF NEW YORK

-against-

KENDALL BROWN, JEFFREY SHERROD and
DARREL SMITH,

A PORTION OF THE
COURT'S CHARGE AND
EXCEPTIONS BY
COUNSEL.

Defendants.

-----x

Bronx County Courthouse
May 2, 1977

B e f o r e :

HON. HAROLD SILBERMANN,

Justice.

A p p e a r a n c e s :

For the People:

MARIO MEROLA, ESQ.
District Attorney, Bronx County
BY: WILLIAM HRABSKY, ESQ.
Assistant District Attorney

For Defendant Brown:

WILLIAM GALLAGHER, ESQ.
BY: NORMAN BUNTAINE, ESQ.
of Counsel

For Defendant Sherrod:

DOMINICK FUSCO, ESQ.

For Defendant Smith:

JOSEPH CAROZZA, ESQ.

oOo

Theodore Martin
Official Court Reporter

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THE COURT: I repeat to you that I will not marshal the testimony of each and every witness nor refer to the evidence to any greater extent than is necessary for such explanation, and I also reiterate my admonition to you that you are to draw no inference whatsoever from my reference or lack of reference to any of the testimony or other evidence as indicative of any opinion on my part as to the credibility, weight or importance of any of the evidence in this case. I repeat that I have no opinion whatsoever on these things.

Since the indictment itself is the best evidence of the charges against each defendant, I will first read each count as written in the indictment, and I will explain this to you as we proceed. The first count of the indictment charges the defendants with the crime of robbery in the first degree as follows...

- - - - -

THE COURT: Are there any exceptions?

MR. CAROZZA: May we approach, Judge?

THE COURT: Yes, sure, you may.

(The following occurred at the sidebar of the

bench, outside the hearing of (jury:)

MR. CAROZZA: If your Honor please, in the beginning of the second portion of your charge where, having announced that the indictment was evidence of nothing, in effect you then said that the best evidence of the charges was the indictment. I think, Judge, I understand what your Honor was saying. I think it was somewhat confusing.

THE COURT: I will not charge anything different. I have always charged that. You may have an exception.

MR. CAROZZA: Thank you.

THE COURT: Any other exceptions?

MR. CAROZZA: That's all.

MR. BUNTAINE: I join in that. I would say at the very end, Judge, here where you read the potential verdict as to count one, guilty or not guilty, then count two, I understood the previous instruction you gave them was that only if not guilty on count one would count two be considered.

THE COURT: That's right.

MR. BUNTAINE: As your Honor instructed it at

Proceedings

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the very close here, it sounded as if--

THE COURT: It should be or I will tell them that.

MR. FUSCO: Just an exception. I join in the exception.

*

*

*

IT IS HEREBY CERTIFIED that the foregoing is a true and correct transcription of the original stenographic notes.

Richard J. Martin
Official Court Reporter

4 30

PATROLMAN EDWARD THOMAS MURPHY,
being duly sworn, testified as follows:

EXAMINATION BY MR. O'SHEA:

Q Would you state your name, shield, and assignment?

A Patrolman Edward Thomas Murphy, #12835, 43rd Precinct.

Q Officer, on December 24th, Christmas Eve of 1974 did you respond to Soundview Avenue and Obanion (P) Avenue in the county of the Bronx?

A Yes, I did.

Q Were you on duty at that time?

A Yes, I was.

Q And did you have an occasion to arrest three people now known to you as Kendall Brown, Jeffrey Sherrod, and Darrel Smith?

A Yes.

Q Would you tell the Grand Jury the circumstances of your arresting them?

A At approximately 1:35 we received a call of a robbery in progress at Soundview and Obanion (P). We were informed on the police radio that the perpetrators were being chased by people in the neighborhood and by the complainant. We responded to 460 Taylor Avenue. They had them trapped in front of the ~~Smith~~ location and we arrested the three defendants and we took from their possession two knives and the defendants resisted us. They were pushing and shoving and punching at us in order from keeping us from handcuffing them.

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31

5/2/77
4:15 PM

We would like to hear Gonzalez's testimony with the District Attorney concerning the knives, also his identification of the men at the scene of the crime. We would also like the testimony of Officer O'Rourke concerning the confiscation of the knives. Also the map of the area.
Mrs Carter

Cont Exhibit 2

5/2/77

JM

A 32

6.05 PM May 2, 1977

We would like to hear the Cross
Examination of Gungaley in
reference to who was holding
the knife in the Crown
at the scene of the crime

Mrs Carter

Q Exhibit #3

A 33

Q 1/2 3/4 5/6 7/7

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

- against-

KENDALL BROWN,

Defendant.
-----X

AFFIRMATION IN OPPOSITION

BILLIE MANNING, being under penalty of perjury and pursuant to Rule 2106 of the C.P.L.R., hereby affirms and states:

I am an Assistant District Attorney in the Office of MARIO MEROLA, District Attorney of Bronx County and make this affirmation in opposition to defendant's motion for a stay of execution of sentence pending appeal.

Kendall Brown was convicted, after a trial before a jury and the Honorable Harold J. Silberman, of the crime of Robbery in the First Degree and sentenced on June 13, 1977, to an indeterminate term of imprisonment not to exceed seven years.

Defendant is moving for a stay of execution of the above sentence pending determination of his appeal to this Court and setting bail in the amount of \$5,000 bond or cash. The defendant sets forth facts concerning his family, education, employment record and prior conflicts with the law to show that he would return to court when and if required to serve his sentence. He further claims that there is a substantial likelihood of reversal of his conviction upon appeal. We do not take issue with the facts set forth by the defendant concerning his background, however, we disagree that there is any likelihood that defendant will be successful upon his appeal and, for the reasons set forth in

the accompanying memorandum of law, we oppose defendant's motion.

WHEREFORE, we respectfully pray that defendant's motion be denied in all respects.

Dated: Bronx, New York

JULY 15, 1977

Billie Manning
BILLIE MANNING
Assistant District Attorney

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

- against -

KENDALL BROWN,

Defendant.
-----X

MEMORANDUM OF LAW

Under Sec. 460.50 (1) of the Criminal Procedure Law, a court may issue an order both (a) staying the execution of judgment and (b) either releasing defendant on his own recognizance or fixing bail. However, since there is no constitutional right to appeal, there is no constitutional right to be free pending appeal (People v. Follette, 290 F. Supp. 636 (D.C.N.Y., 1968)). The mere fact that a defendant in New York has the right to appeal from a verdict does not automatically confer upon him a right to bail. The laws relating to bail treat unconvicted defendants more liberally than those who have been convicted and are seeking appellate reversal (see e.g., People v. Holder, 70 Misc.2d 819 (Co. Ct., Nassau Co., 1972), aff'd 45 A.D.2d 820).

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The test of whether a defendant should be admitted to bail pending appeal is (1) whether there is an arguable issue of some merit which in justice should be reviewed on appeal and (2) do the bail criteria set forth in Sec. 510.30 of the C.P.L. warrant fixation of bail. In considering these factors, in the case of one who has been convicted and sentenced, great weight should be given to the probability that flight is more likely after sentence and conviction than before. Merit or lack of merit should not be controlling (People v. Surretsky, 67 Misc. 2d 966 (Sup. Ct.,

New York Co., 1971).

In the case at bar, the presumption of innocence has been destroyed and defendant is a convicted felon under an indeterminate sentence of seven years. While the facts defendant sets forth concerning his background would be adequate to establish his right to his freedom pending trial, his conviction and sentence substantially increase the likelihood that he will not voluntarily return to court if and when he is ordered to surrender.

However, it would work a severe injustice if the defendant were to begin serving a sentence if there were any substantial likelihood of ultimate reversal. Unfortunately, a perusal of the defendant's allegations of error occurring during the trial reveals that it is improbable that error will be found, let alone error of such magnitude that reversal is mandated.

First, defendant claims that it was error for the trial court to state during his charge: "Since the indictment itself is the best evidence of the charges against each defendant, I will first read each count as written in the indictment, and I will explain this to you as we proceed." Clearly, this is not an erroneous statement of the law since it is true that the indictment is the best available statement of the charges. I am informed by the Assistant District Attorney who tried the defendant, William Hrabsky, that Mr. Justice Silberman charged clearly and repeatedly that the indictment was not proof of guilt and was not evidence. We submit that the charge as a whole could not have been misleading to the jurors. We further point out that jurors are laymen for whom the words "best evidence" are not a term of art and this would not tend to be confused with the legal

principle of the same name. In the recent case of People v. Stanard the identical claim of error was made and found to be without merit (Portion of Respondent's brief to Court of Appeals answering this claim and opinion of Court are attached). In sum, although a trial judge might be better advised to avoid using the word "evidence" in the loose sense in which it is frequently employed in everyday conversation, to do so is not error.

Second, defendant claims that he was deprived of a fair trial because he was not able to use a portion of the Grand Jury testimony of a Police Officer Murphy to impeach testimony offered by the prosecution concerning the recovery of two knives admitted into evidence. The testimony at trial showed that the complainant was knocked down by a group of five young black males who threatened him with knives and took \$100 from him. The complainant obtained the assistance of some people passing by in two gypsy cabs. The two cabs gave chase, with the complainant riding in one of them. The complainant apprehended co-defendant Daniel Smith. The occupants of the second cab caught defendant Kendall Brown and co-defendant Jeffrey Sherrod. When Police Officer O'Rourke and Murphy arrived to take custody of the three, they recovered a knife from Smith's possession and were given a second knife by a person from the group surrounding defendant and Sherrod, and told it had been dropped by one of the suspects during the scuffle in which they were captured. The theory under which defendant was prosecuted and convicted was that he was acting in concert with Smith, Sherrod and others to rob the complainant at knife point. A knife was in Smith's actual possession upon his

arrest and the complainant testified that others who attacked him were armed with knives. The second knife found by the passersby and turned over to the police was merely offered to corroborate the complaining witness's testimony that more than one perpetrator was armed. Obviously, this second knife would not have been given great weight by the jury, even that its connection with the defendants was not directly established. In sum, the presence of the second knife at the scene of the capture of defendant and Sherrod could not have been a vital factor in defendant's conviction of robbery.

Police Officer O'Rourke testified as stated above concerning the recovery of the second knife, Police Officer Murphy did not testify. The defendant wished to impeach O'Rourke's testimony through the admission of the Grand Jury testimony of Police Officer Murphy in which he stated he responded to a radio call that three robbery suspects were being pursued, arrived at an address where suspects were being held, "and we arrested the three defendant's and we took from their possession two knives...." The prosecutor objected to the admission of this testimony on the grounds that it was equivocal as well as on the grounds that the officer would not have the opportunity to offer any explanation of the Grand Jury testimony or his current recollection of the events which occurred on the day of the arrests.

Sections 670.10 and 670.20 of the Criminal Procedure Law govern the admission of prior testimony in a criminal trial, and require, among other things, that the witness cannot with due diligence be brought into court and that the opposing party had

an adequate right of cross examination at the prior proceeding. These sections permit the use of prior testimony given at trial, a preliminary hearing or a conditional examination pursuant to Article 660 of the CPL. Clearly, the prior testimony was legally inadmissible on several grounds, the most crucial being the lack of full examination in the Grand Jury setting. If an overriding necessity had been shown by the defendant to have the other wise inadmissible testimony introduced, under the circumstances that the defense learned of the prior testimony during trial, strict rules of evidence might possibly have to give way. However, as has been discussed, at best the defendant could only have hoped to have placed in doubt the less-than-crucial testimony by Police Officer O'Rourke that passersby had given him a knife that defendant or a co-defendant were said to have dropped. Since co-defendant Smith was captured by the complainant while in actual possession of a knife the existence of a second knife was unnecessary to a robbery conviction and moreover, the existence of other knives was more reliably supported by the complainant's eyewitness account. Therefore, the trial court was emphatically not in error in refusing to admit the prior testimony.

Neither can it be said that there was any unfairness on the part of the prosecutor for refusing to consent to the admission of the inadmissible testimony or to stipulate that, if called, Police Officer Murphy would testify as he had in the Grand Jury. The prosecutor reasonably suspected that, if called, Police Officer Murphy might clarify his testimony that "... we took from their possession two knives..." It would be unfair to expect an

advocate on either side of a criminal case to agree to the admission of testimony he believed to be equivocal where there would be no opportunity for further inquiry.

If, as we believe we have demonstrated, defendant stands no chance of succeeding in overturning his conviction on appeal, he will only be postponing the inevitable. We question the benefit of such a maneuver even for the defendant, who might well be better off, young as he is, getting his sentence behind him as soon as possible. Certainly, the granting of bail where there is no likelihood of ultimate exoneration acts in derogation of society's need for swift and certain punishment for crimes proven, and serves to discourage victims of crimes from undergoing the inconvenience and effort of prosecution.

CONCLUSION

THE DEFENDANT SHOULD NOT BE ADMITTED TO BAIL PENDING HIS APPEAL.

POINT THREE

The court's charge was proper in all respects [answering defendant-appellant's brief, Point III, pp. 43-47].

The court below delivered a charge which, as a whole, might serve as a model in its fairness, carefulness, and clarity, particularly in view of the fact that the nature of the case required that the charge be lengthy and somewhat complicated. This Court has only to turn to the transcript of the charge below (1211-72) to be convinced of the inaccuracy of appellant's assessment that the trial court held a "negative attitude towards appellant's right to a fair trial throughout the entire proceedings" and "did not seem to be particularly concerned with protecting appellant's rights, especially at this critical stage of the proceedings," (appellant's brief, pp. 44, 45). We proceed to address defendant's specific claims of error.

Defendant claims that the trial judge committed error by instructing the jury that "the indictment was the best evidence in this case" (appellant's brief, p. 43). First, this is an inaccurate paraphrase of what the judge actually said:

Now since the indictment is the best evidence of the crimes charged against the defendant, I shall go ahead immediately to that (1228-9).

Second, as a reading of the entire charge makes clear, the court was merely saying that the indictment was the best indication of what crimes the defendant was charged with, a proper statement, and the jurors could not have thought the court was telling them that the indictment itself was

evidence. The court had already firmly instructed the jurors as follows:

Now under our system of jurisprudence, all cases—are initiated by charges. The charges are contained in an indictment and an indictment is merely a legal form by which a crime is charged. It is nothing more than an accusation and has no evidentiary or probative value whatsoever. It is neither evidence of anything or does it prove anything (1215).

We believe that even appellant would have to agree that the court's instructions on this point were clear, forceful and could scarcely be improved. But this was not all. Following his reading and explanation of the indictment the court added:

The indictment is no indication of guilt on the part of the defendant. He is presumed to be innocent at all times * * * (1234).

The trial judge had also given most careful instructions concerning the jury's duty to find facts only from the evidence and as to what was in evidence (29, 30, 1213-6). We also note that when the indictment was first read to the jury during the prosecutor's opening statement, he also cautioned that it was not evidence (85). In view of the fact that the charge is to be examined as a whole, we submit that it is sheer fallacy to speculate that the jurors were misled [*People v. Jones*, 27 N.Y. 2d 222 (1970)].

Defendant's second complaint is that the court, in explaining the requirement of corroboration in perjury cases, said that "[i]n this case we have the testimony of Juan and Dolores Carreras as to the accusations contained in the first count of the indictment" and pointed out that Victor

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

KENDALL BROWN,

Defendant-Appellant.
-----X

Bronx Indictment #
3861875

RECEIVED

JUL 18 1977

APPELLATE DIVISION SUPREME
COURT, FIRST DEPARTMENT

REPLY
MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANT-APPELLANT'S
APPLICATION FOR BAIL PENDING
APPEAL

~~RECEIVED~~
~~JUL 15 1977~~
~~APPELLATE DIVISION SUPREME~~
~~COURT, FIRST DEPARTMENT~~

RICHARD J. KLEIN
Attorney for Defendant-
Appellant
909 Sheridan Avenue
Bronx, N.Y. 10451
212 - 992-8134

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ARGUMENT

PRELIMINARY ARGUMENT

The People's answer does not dispute Kendall Brown's background. It accepts the presentation presently before the Court of his family, education, employment experience, conflicts with the law, and community ties. In fact, they agreed that his background merited granting him pre-trial bail. However, they oppose bail now on the speculation that after conviction and sentence the chances are greater that he will not return to court when required, and that there is no liklihood that he will be successful on appeal.

Kendall Brown's record of responsibility to the court, while on bail for approximately two and one-half years, is a fact that should not be overlooked. While it is true that a finding that an appeal is palpably without merit would justify a denial of bail, that same finding does not require such a result by law.* The Practice Commentary to §460.50 of the C.P.L. indicates that a "reasonable possibility of reversal on appeal... is merely one factor, and doubtless not the most important to be considered on the bail application".

The conclusion of the Assistant District Attorney, who was not present at the trial, that there is no liklihood of reversal on appeal, before a written transcript of the trial is

* See §510.30-2(b) of the C.P.L.

transcribed and available to either counsel, is both premature and suspect. Counsel has read of cases where an entire appellate court concludes, after full argument with complete transcripts for all parties, that an appeal has no merit, only to see it reversed by a higher court.

The concluding argument of the People that

"If...defendant stands no chance of succeeding in overturning his conviction on appeal, he will be only postponing the inevitable. We question the benefit of such a maneuver even for the defendant, who might well be better off, young as he is, getting his sentence behind him as soon as possible."

is an inappropriate comment in a democratic society where a defendant convicted after trial files a timely notice of appeal, continues to maintain his innocence, and pursues his legal rights and remedies under law.

I will attempt to clarify the weaknesses in the People's answer on the two points raised by defendant's original memorandum. I ask this Court to keep clearly in mind that counsel is limited by not having a transcript, not only in this part of the application, but also in raising other points of which I presently have no knowledge.

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POINT I

THE COURT'S CHARGE THAT "THE INDICTMENT
WAS THE BEST EVIDENCE OF THE CHARGES
AGAINST THE DEFENDANTS" WAS ERROR (Reply).

In the People's answer, they state:

"In sum although a trial judge might be better advised to avoid using the word 'evidence' in the loose sense in which it is frequently employed in everyday conversation, to do so is not error."

They contend that the full record of the trial will reveal that the judge often charged the indictment was not proof or evidence of guilt, and the charge taken as a whole was not misleading. This is the same argument made by the People in People v. Stanard, N.Y. 2d .*

Although the language considered by the Court of Appeals in Stanard, supra, was the same, the circumstances were not. When counsel made proper objection to the charge, the judge there refused to clarify not because he thought that such a charge was proper, but because he did not believe he had made the statement.** It was a matter of an "inadvertant slip". The People in Stanard highlighted the fact that following

* See exhibit from Respondent's brief in the Court of Appeals attached to People's answer.

** See Exhibit E, copy of page 44 from Defendant Stanard's brief in the Court of Appeals provided to counsel by the Assistant District Attorney.

the "slip" in the charge, the judge did reiterate the proper law before he finished his charge so that the last thing the jury heard was correct.

In the case at bar we are not dealing with an "inadvertant slip". The judge knew exactly what he had said. The choice of words was deliberate and apparantly part of this judge's continuous practice.* While the excerpt of the transcript suggests that proper instruction was given the jury earlier in the case, it appears to counsel, based on the excerpt which we have, that the last thing the jury heard on the point was this misleading instruction.

If the court had yielded to the defense request to clear up whatever confusion existed, there is no question that the Stanard decision would control this situation. This did not occur. It would be unwise for this Court to determine without a full transcript whether the charge as a whole was sufficient to overcome this deficiency in a close case.

Whatever decision the court ultimately reaches on this point when it comes for determination on appeal, the continuation of the use of this type of "loose judicial language" can only undermine the defendant's right to have a jury clearly charged on a fundamental principle of law. Any prejudice that arises on

* See page 3 of certified transcript (Exhibit A) attached to the original memorandum.

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this point is always to the detriment of the defendant. The ability of our community to provide a fair trial is weakened by permitting a charge of this sort to be intentionally used without, at the least, giving the defendant the privilege of clarification.

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POINT II

THE REFUSAL OF THE COURT TO ADMIT INTO EVIDENCE A PORTION OF THE GRAND JURY TESTIMONY OF AN ARRESTING OFFICER WHO WAS RETIRED AND UNAVAILABLE WAS UNJUST (Reply).

The People in their answer contend:

"In sum, the presence of the second knife at the scene of the capture of the defendant and Sherrod could not have been a vital factor in the defendant's conviction of robbery."

"However, as has been discussed, at best the defendant could only have hoped to have placed in doubt the less than crucial testimony by Police Officer O'Rourke that 'passersby' had given him a knife that defendant or a co-defendant were said to have dropped."

The facts do not support these conclusions. At the time the inconsistent Grand Jury testimony was offered, Gonzales had testified that the man he later identified as Sherrod had discarded in flight the knife used in the incident.* If the jury had heard Murphy's testimony that the knife in evidence was taken from the possession of either Sherrod or Brown, they would have concluded that there was a reasonable doubt on the issue of identification with respect to both Sherrod and Brown, under the facts here.

* There is no allegation in the indictment that this knife was illegal per se.

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If Sherrod had a knife on him when he was arrested, then Gonzales' testimony about seeing Sherrod throw the knife away was a misidentification and erroneous. Further, the testimony of O'Rourke and Gonzales, on which the entire conviction is based, is untrue, at least concerning the finding of the knife from "passersby". This same conclusion of false testimony about the finding of the knife would obtain even if Murphy testified the knife was found on Brown.

If the Grand Jury testimony has been admitted, it would have been possible for the jury in deliberation to totally disregard this testimony of Murphy as untrue or of little value. However, before the jury could reach this conclusion, they would have had to find that the testimony of a veteran police officer in front of the Grand Jury and the prosecution was, if not dishonest, less than straightforward. The Court is well aware of the ramifications of less than honest police testimony in the prosecution of a close case.

The prosecution contends that it was the "equivocable" nature of the sworn testimony that prevented them from stipulation. It is hard to find any legitimate explanation of how a veteran officer testifies that he took an object from the possession of another, if he has never seen the object in that person's possession and he received it from a third person. Any explanation that is not consistent with the

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normal meaning of the words used would leave an ordinary citizen with the taste of dishonesty, if nothing more.

The People further contend:

"Clearly, the prior testimony was legally inadmissible on several grounds the most crucial being the lack of full examination in a Grand Jury setting."

It is hard to listen to the prosecution argue that testimony of a veteran officer that they now call "equivocal", presented on their own case to the Grand Jury with an unlimited right of examination, should be inadmissible because they can't cross examine at trial. The lack of merit of this argument is thoroughly outlined in counsel's original memorandum.

In the midst of a trial, it is not difficult to understand the effort of an advocate to keep from the jury evidence that, at its best, would point to innocence and at its worst would create a conflict in the evidence by undermining the honesty and reliability of the police and the People's sole eye witness. The law of reasonable doubt clearly provides that a reasonable doubt may arise from the evidence, a conflict in the evidence or the lack of evidence.* The issues raised by Murphy's testimony were never before this jury. The jury had no reason to suspect any conflict in the evidence. They had no opportunity to evaluate and determine the importance or lack of importance of Murphy's absence from the trial.

* People v. Gambino, 52 A.D. 2d 957 (2nd Dept.).

The "Interests of Justice" are poorly served by any ruling of law that would allow the People's case to be aided or strengthened by the unavailability of a police officer, especially when this occurs through no fault of the defense, and the record indicates that such an advantage would accrue.

The testimony should have been offered to the jury for its determination of its worth.

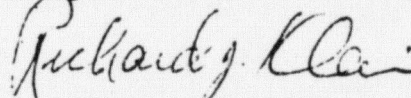
A 54

CONCLUSION

IN LIGHT OF THE FACT THAT THIS WAS A CLOSE CASE ON THE ISSUE OF GUILT, WHERE THE JURY IN A ONE WITNESS IDENTIFICATION DELIBERATED OVER 26 HOURS, THE LIMITED ARGUMENT OF COUNSEL WITHOUT THE BENEFIT OF A TRIAL TRANSCRIPT DEMONSTRATING AN UNCORRECTED ERROR IN THE JUDGE'S CHARGE ON A FUNDAMENTAL PRINCIPLE OF LAW, AND A SERIOUS QUESTION OF THE PROPRIETY OF EXCLUDING CERTAIN EVIDENCE FROM THE JURY'S CONSIDERATION INDICATES A REASONABLE POSSIBILITY OF REVERSAL ON APPEAL.

ACCORDINGLY, THE APPLICATION OF KENDALL BROWN, WHO HAS PROVEN HIS RESPONSIBILITY TO THE COURT SYSTEM WHILE ON BAIL FOR TWO AND ONE-HALF YEARS PRIOR TO CONVICTION, FOR BAIL PENDING THE DETERMINATION OF HIS APPEAL SHOULD BE GRANTED.

Respectfully Submitted,



RICHARD J. KLEIN

Attorney for Defendant-Appellant

July 18, 1977

Specifically, in reference to the indictment, the court charged, "Now since the indictment is the best evidence of the crimes charged against the Defendant, I shall go ahead immediately to that." (1228-29) This charge in and of itself should require a reversal of appellant's conviction. It matters not that the court had previously instructed the jury that the indictment was not evidence of any crime (1215). The court's fatal charge on this subject occurred right before its analysis of the lengthy indictment. In this context, the jury could very well have believed that the indictment was in fact the "best evidence" against appellant. Moreover, the court's charge cannot be justified on the ground that it may have been inadvertent. This "inadvertent" slip of the tongue had as grave a consequence for appellant as any error.

But even more devastating, there was no excuse for the court's failure to correct such a blatant error. At the conclusion of its charge, counsel promptly brought to the court's attention that such an error had been made (1274). The court, however, adamantly refused to correct itself. Although it appears that the court did not believe counsel's assertions, it was incumbent upon the court to at least check with the stenographer to determine if such an error had been made. The court's refusal to take any action and its automatic denial of appellant's exception to the charge were indicative of its negative attitude towards appellant's right to a fair

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

M-2303

People of the State of New York,

Respondent,

v.

Kendall Brown

Defendant-Appellant.

ORDER DENYING BAIL
AFTER APPEAL TAKEN

Indictment No.

38/1975

An appeal having been taken to this Court by the above-named defendant from the judgment of the Supreme Court, Bronx County, rendered on June 13, 1977, and defendant having moved, pursuant to CPL §§460.50 and 530.50, to be admitted to bail pending the hearing and determination of the aforesaid appeal,

Now, upon reading and filing the notice of motion,
with proof of due service thereof, and the affirmation of
Richard J. Klein in support of said motion, and
the affirmation of Billie Manning in opposition
thereto, and after hearing Richard J. Klein for the
motion, and Billie Manning opposed, it is

ORDERED that said motion be and the same hereby is denied.

Associate Justice

Dated: July 21, 1977

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KENDALL BROWN,

Plaintiff,

- against -

JOHN WILMOT, Superintendent of Elmira
Correction Center and LOUIS J.
LEFKOWITZ, Attorney General of the
State of New York,

Defendants.

MEMORANDUM

77 Civ. 4317 (HFW)

APPEARANCES:

HENRY F. WERKER, D. J.

Petitioner Kendall Brown was convicted by jury in New York State Supreme Court of the crime of robbery in the first degree on June 13, 1977 and was sentenced to an indeterminate prison term not to exceed seven years. He is currently incarcerated in the Elmire Correction and Reception Center in Elmira, New York. Subsequent to his conviction, petitioner applied for bail pending appeal to the Appellate Division and his application was denied by a justice of the Appellate Division without stated reasons for such denial. In the instant proceeding, Kendall Brown seeks a writ of habeas corpus, alleging that the denial of his application for bail pending appeal without stated reasons violates his rights to due process of law guaranteed under the Eighth and Fourteenth Amendments to the United States Constitution.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. section 2254(a) which permits a person held in state custody to apply for a writ of habeas corpus on the ground that he is being detained in violation of the Constitution of the United States. Section 2254(b) of title 28 requires that petitioner have exhausted state remedies before this district court will entertain an application of habeas corpus. Since the denial of an application for bail pending appeal is not an appealable order within the New York state court system, petitioner has exhausted his remedies under state law; therefore the jurisdictional requirement has been satisfied. United States ex rel. Tuthill v. Sherwood, 399 F. Supp. 32, 33 (S.D.N.Y. 1975). However, for the reasons stated below the petition for a writ of habeas corpus is denied.

It is well settled law that while there is no constitutional right to bail, Abbot v. Laurie, 422 F. Supp. 976, 978 (D.R.I. 1976), when a state created provision for bail pending appeal exists, bail must not be denied arbitrarily to those who apply for it. United States ex rel. Walker v. Twomey, 484 F.2d 874, 875 (7th Cir. 1973) (per curiam). Petitioner in this case argues that his denial of bail without stated reasons constitutes arbitrary action violative of his constitutional rights. I am not authorized to and will not substitute my judgment on the merits for that of the justice of the Appellate Division who denied bail to the petitioner, United States ex rel. Tuthill v. Sherwood, 399 F. Supp. at 34; rather, this habeas corpus review is confined to the sole issue of whether the petitioner's Eighth and Fourteenth Amendment rights were in fact violated due to the absence of reasons for his bail denial.

In reviewing the action of the justice of the Appellate Division, I note that there is no state requirement that written reasons be stated upon a denial of bail pending appeal. Petitioner had a full and fair opportunity to present his request and reasons for bail before the justice who denied it and the decision denying bail was rendered in accordance with New York state procedures. Cf. Stone v. Powell, 428 U.S. 465 (1976). (In Stone the Supreme Court noted "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial." 428 U.S. at 494.) I am of the opinion that this reasoning is equally applicable to petitioner's due process claim here. Additionally, the state procedure of bail denial without reasons carries with it a presumption of regularity. See United States ex rel. Walker v. Twomey, 484 F.2d 874, 876 (7th Cir. 1973) (per curiam); Natal v. People of Puerto Rico, 424 F. Supp. 1082, 1085 (D.P.R. 1975); United States ex rel. Kane v. Bensinger, 359 F. Supp. 181, 183 (N.D. Ill. 1972). To overcome such presumption, petitioner must show that the record provided no rational basis for the denial of bail. United States ex rel. Kane v. Bensinger, 359 F. Supp. at 184. This the petitioner has failed to do. In light of the seriousness of petitioner's offense (robbery in the first degree) the justice of the Appellate Division may be said to have had ample cause to deny bail pending appeal. Furthermore, I am not prepared to hold that a failure to provide reasons for denial of bail in a post-conviction context is per se arbitrary action in violation of Eighth and Fourteenth Amendment

rights. See United States ex rel. Kane v. Bensinger, 359 F. Supp. at 183. Nor will this federal court impose a procedural requirement of stated reasons for bail denial upon the New York State courts. As was stated in United States ex rel. Walker v. Twomey, 484 F.2d at 876:

The fact that articulation by a state court of its reasons for denial of release on bail would usually make it easier for a federal court, considering a petition for habeas corpus, to decide whether the denial could be said to have a rational basis, does not authorize federal courts to impose that procedural requirement on state courts.

In so holding that a denial of bail pending appeal without stated reasons is not arbitrary action violative of constitutional rights under the Eighth and Fourteenth Amendments, this court is well aware of existing case law to the contrary. See, e.g., United States ex rel. Abate v. Malcolm, 397 F. Supp. 715 (E.D.N.Y. 1975), vacated, 522 F.2d 826 (2d Cir. 1975); Abbot v. Laurie, 422 F. Supp. 978 (D.R.I. 1976); United States ex rel. Bad Heart Bull v. Parkinson, 381 F. Supp. 985 (D.S.D. 1974). However, for the reasons outlined above I decline to follow such contrary authority.

Moreover, although petitioner relies on Abate as authority within this particular circuit in support of his position, I find that case clearly distinguishable on its facts. Abate involved a petitioner, free on his own recognizance at the time of trial, who was subsequently sentenced to one year imprisonment after conviction of possession of stolen property. He was denied bail pending appeal. The prosecution, in opposition to bail pending appeal, did not rely on the trial record but merely issued to the judge denying bail a conclusory statement that an appeal would be "without

merit," while the petitioner presented non-frivolous grounds for such appeal. Further, since the sentence was only for a term of one year, it was unlikely that a successful appeal would occur before either the greater part or all of the petitioner's sentence was served. Considering this particular set of facts, the district court judge determined that a conditional writ of habeas corpus should issue with a stay of execution to give the state court an opportunity to reconsider its denial of bail or to support such denial with findings of fact or reasons.

In the present case the facts are dissimilar. The conviction at hand involved robbery in the first degree — a crime most unlike the non-violent crime of possession of stolen property. Secondly, we cannot say that the major portion of Kendall Brown's indeterminate sentence with its seven year maximum term will be served before his appeal is heard in state court, as was the case in Abate. Thirdly, although petitioner Brown has asserted what may ultimately prove to be a non-frivolous ground for appeal, the district attorney also has argued non-frivolous reasons, based on the record, why he thinks the appeal will fail. This case is very different from Abate where the district attorney uttered mere conclusions that an appeal was without merit to the judge who denied bail. As the Second Circuit noted, in Abate there was "serious ground for reconsideration of the denial of bail." 522 F.2d at 827 (emphasis added). No such element is present in the case at hand, and to order the state court judge to state reasons for his rationally based denial of bail would amount to nothing more than an exercise in futility. The writ of habeas corpus is therefore denied.

SO ORDERED.

DATED: New York, New York
October 13, 1977

Henry J. Hinkley
U. S. D. J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

KENDALL BROWN,

Petitioner,

-against-

JOHN WILMOT, Superintendent of
Elmira Correction Center, and
LOUIS J. LEFKOWITZ, Attorney
General of the State of New York

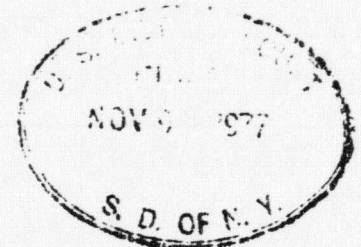
Respondents.

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NOTICE is hereby given that KENDALL BROWN, petitioner named above, hereby appeals to the United States Court of Appeal for the Second Circuit from the order denying the petitioner's writ of habeas corpus under 28 U.S.C. §2254 entered in this action on the 13th day of October, 1977.

Dated: Bronx, New York

November 7, 1977



NOTICE OF APPEAL

77 CIV 4317 (HFW)

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TO:

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